

BEFORE DELHI VALUE ADDED TAX, APPELLATE TRIBUNAL, DELHI
Sh. Narinder Kumar, Member (Judicial)

M.A. No. 303/23
In Appeal No. 118/ATVAT/23
Date of Order: 04/10/2023

M/s Aero Club,
867, Joshi Road,
Karol Bagh,
New Delhi- 110005.

.....Applicant

v.

Commissioner of Trade & Taxes, Delhi.

.....Respondent

Counsel representing the Applicant : Sh. Rajesh Mahna
Counsel representing the Revenue : Sh. P. Tara

Order

1. The above captioned appeal No. 118/23 came to be presented before the Registry on 14/09/2023.

The appeal is accompanied by M.A. No. 303/23 u/s 76 (4) of Delhi Value Added Tax Act (hereinafter referred to as DVAT Act).

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2. Appellant-applicant is feeling aggrieved by order dated 31/07/2023 passed by learned Special Objection Hearing Authority (hereinafter referred to as SOHA), whereby, after granting certain exemptions to the applicant-assessee on production of 5 'C' forms and 44 'F' forms, but having regard to non-production of remaining 'C' forms worth Rs. 1,14,03,885/- (on which tax @ 3% has been levied, with interest); non-production of 'C' forms worth Rs. 8,86,313/- (which has been taxed @ 10.5% with interest); as regards non production of 'F' forms worth Rs. 1,30,24,759/- (which has been taxed @ 5% with interest) and non-production of 'F' forms worth Rs. 13,97,521/- (which has been taxed @ 12.5% with interest), learned SOHA has upheld the demand of tax and interest to this extent.
3. Vide default assessment of tax and interest dated 18/03/2021, framed under Central Sales Tax Act (in short 'CST Act') learned Assessing Authority- Assistant Commissioner (Ward-206) raised demand of Additional tax of Rs. 2,42,87,372/- and that of interest of Rs. 1,42,33,065/-.
4. Learned Assessing Authority recorded following reasons for framing of default assessment of tax and interest:

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"A notice has been issued to the dealer u/s 59 (2) for seeking additional information for the assessment year 2016-17. In response to the notice Sh. Sohan Lal Sharma, Authorised Signatory was present on behalf of the dealer alongwith POA on 27/02/2021, 04-03-2021, 16-03-2021 & 18-03-2021 and produced Sales/Purchase Summary, Trading Account of Delhi Branch, Audited Balance Sheet, DVAT-30/31, Export certificate, Statutory/declaration forms, statutory form reconciliation, VAT/CST payment details and other supporting documents pertaining to the business affairs of the dealer. The information/documents furnished by the dealer were examined.

During the tax period from to 01/04/2016 to 31/03/2017 dealer has a gross turnover of Rs. 8,18,27,23,941/- including Central turnover of Rs. 7,30,97,47,046/- (including goods return of Rs. 36,75,497/-) and VAT sale of Rs. 87,29,76,895/-.

The dealer has made Export Sale amounting to Rs. 23,04,70,957/- and submitted C.A. certificate in support of export sale, credit is allowed after test check.

The dealer has made Exempted Sale amounting to Rs. 94,00,377/-, credit is allowed after test check.

The dealer has made stock transfer against F-forms of Rs. 6,59,99,01,560/- and submitted F-forms of the value of transaction of Rs. 6,29,25,62,957/-, credit is allowed after test check.

The dealer has still short **F-forms** of Rs. 30,73,38,602/- (Rs. 21,51,37,021/- is taxed @ 5% with interest and Rs. 9,22,01,581/- is taxed @ 12.5% with interest).

The dealer has made central concessional sale against '**C**' form of Rs. 33,06,45,422/- after allowing sales return of Rs. 36,75,497/- in 2016-17. The same is verified from the details available in the returns. The dealer has submitted C-forms amounting to Rs. 30,80,44,350/- exemption on it is allowed after test check.

However, the dealer failed to file '**C**' forms of Rs. 2,26,01,072/- (Rs. 1,38,66,146/- is taxed @ 5% with interest and Rs. 87,34,926/- is taxed @ 12.5% with interest). The dealer has already deposited 2% CST, credit of which is allowed."

5. Hence, this application accompanying the appeal.

6. Arguments heard. File perused.

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7. Dealer – assessee - applicant, a partnership firm stands registered vide TIN No. 07570161712, and is engaged in the business of trading of shoes, garments and other accessories under the brand of 'Woodland'.
8. Counsel for the applicant has submitted that the factum of furnishing of two 'C' forms during pendency of this matter be taken into consideration, while entertaining the appeal and passing order as regards pre-deposit.

Counsel has further submitted that today he has submitted copies of two E-mails dated 18/09/2023 in proof of the steps taken by the applicant to collect remaining statutory forms.

Counsel has further submitted that litigation is going on between the applicant and Universal Shoes, by way of a civil suit before Ahmedabad Civil Court regarding some statutory forms and that this fact be also taking into consideration while passing orders as regards pre-deposit.

Further, it has been submitted by the counsel for applicant that inability of the applicant to collect remaining statutory forms be also considered. In support of his submissions, counsel has raised reliance on decision in **Bharat Sanchar**

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Nigam Ltd. v. Commissioner of Commercial Tax,
MANU/UP/2138/2016.

9. On the other hand, counsel for the respondent has contended that matter pertains to tax period - Annual 2016 and on behalf of the applicant two E-mails, dated 18/09/2023, are stated to be from the two branches of the applicant, but, the applicant has failed to furnish any proof regarding ~~any~~ steps, *if any,* taken earlier, to collect statutory forms.

Counsel for the respondent has submitted that while disposing of this application this Appellate Tribunal may consider copies of the two 'C' forms produced on behalf of the applicant during pendency of this appeal, but, appropriate order may be passed calling upon the applicant to deposit by way of pre-deposit for the purpose of entertaining this appeal, having regard to the fact that no other statutory form has been filed or was filed before the authorities below ever since the concerned tax period and no step was taken by the applicant to secure the remaining statutory forms.

10. I have gone through the decision cited by counsel for the applicant to appreciate the contentions raised on this application.

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11. It may be mentioned here that in the application, the applicant has come up with the version that statutory forms could not be produced before learned SOHA as the same were not available and further that even at present remaining statutory forms are not available. Applicant has tried to explain in the memorandum of appeal that it was in the process of collection of the remaining statutory forms from the concerned dealers, to whom the goods were transferred by way of inter-state sale transactions, but due to trade practices, pressure on the salesmen and other difficulties faced in the course of sale, the remaining statutory forms could not be delivered to the applicant.

When earlier the application u/s 76(4) was taken up, counsel for the applicant sought adjournment for production of some statutory forms while stating at Bar that applicant has subsequently received said forms. The application was accordingly adjourned for filing of an application seeking permission to produce on record said statutory forms stated to be available with the applicant. However, no such application was drafted or presented by the given date, despite opportunity. Proxy counsel for the applicant, who appeared on the said date, after going through the brief submitted that it contained copy of only one 'C' form. Proxy



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counsel placed on record copy of the said single 'C' form. He also submitted that no application seeking permission to place on record said statutory form was drafted. Till today, no such application has been presented.

Today, with the written arguments, counsel for the applicant has submitted true copy of one 'C' Form, for the period from 01/10/2016 to 31/12/2016 bearing the date of issuance as 08/12/2017, but, no application seeking permission to place on record the said statutory form has been presented.

12. Sub-section (4) of section 76 of the Act provides that no appeal against an assessment shall be entertained by the Appellate Tribunal, unless the appeal is accompanied by satisfactory proof of the payment of the amount in dispute, and any other amount assessed as due from the person.

As per first proviso to sub-section (4) of section 76, the Appellate Tribunal may, if it thinks fit, for reasons to be recorded in writing, entertain an appeal against such order without payment of some or all of the amount in dispute, on the appellant furnishing in the prescribed manner security for such amount, as it may direct.

On the point of admission of appeal with or without pre-



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deposit, in **Ravi Gupta Vs. Commissioner Sales Tax,**
2009(237) E.L.T.3 (S.C.), it was held as under:-

"It is true that on merely establishing a prima facie case, interim order of protection should not be passed. But if on a cursory glance it appears that the demand raised has no legs to stand, it would be undesirable to require the assessee to pay full or substantive part of the demand. Petitions for stay should not be disposed of in a routine matter unmindful of the consequences flowing from the order requiring the assessee to deposit full or part of the demand. There can be no rule of universal application in such matters and the order has to be passed keeping in view the factual scenario involved. Merely because this court has indicated the principles that does not give a license to the forum/ authority to pass an order which cannot be sustained on the touchstone of fairness, legality and public interest. Where denial of interim relief may lead to public mischief, grave irreparable private injury or shake a citizen's faith in the impartiality of public administration, interim relief can be given."

13. So far as the factors to be taken into consideration at the time of disposal of applications u/s 76(4) of DVAT Act are concerned, as observed in the order dated 07/10/2020, passed by our own Hon'ble High Court in S.T. Appeal No. 1/2020,



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M/s. IKEA Trading (India) Pvt. Ltd. v. Commissioner of Trade & Taxes, if a dealer-applicant has a strong prima-facie case and on a cursory glance it appears that the demand raised completely lacks foundation, this aspect of the matter has to be necessarily considered by the Appellate Tribunal, while deciding such an application u/s 76(4) of DVAT Act, and further that it may be remembered that where an assessee has established a *prima-facie* case it would not *ipso facto* entail sufficient justification for grant of dispensation.

Hon'ble High Court went on to observe that each case will depend on its own facts and the Appellate Authority will have to weigh the factual scenario involved. As regards wide-ranging discretion vested with the Appellant Authority, Hon'ble Court observed that the same necessarily implies that the exercise of this power has to be based on a case-to-case.

Hon'ble Court further observed that the Appellate Tribunal has to be mindful of the consequences that would follow from an order that requires the Assessee to deposit the whole or part of the demand raised by the Department, and that discretion should not be exercised in a mechanical manner

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and rather, should be exercised after taking into account the totality of the circumstances which include prima-facie case.

It was further opined by the Hon'ble High Court that provision u/s 76(4) of DVAT Act is wide enough to consider various aspects which may contribute to mitigating factors, including the aspect of undue hardship or weak financial condition of an Assessee. In all fiscal statutes, balance of convenience or irreparable loss are manifest in the concept of undue financial hardship.

14. As noticed above, the assessments came to be framed due to the reasons including non-production of 'C' and 'F' forms by the applicant – assessee in respect of the tax period – Annual 2016. When the matter came up before learned SOHA, he took into consideration some of the statutory forms which were produced before him during objection proceedings and accordingly granted exemption in respect thereof. Learned SOHA upheld the assessment as regards demand of tax and interest in respect of the statutory forms not produced even up to that stage.
15. Indisputably, only two 'C' forms have been submitted by the applicant during pendency of this appeal. One of the said 'C' forms bears the date of its issuance as 10/08/2017 and the



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other 'C' form bears the date of issuance as 08/12/2017. It was for the applicant to specifically allege as to on which date it has received said two forms so as to show that the same have been recently received and were not provided by the other dealers even up to the stage of disposal of the objection proceedings. No document has also been filed in proof of this fact.

Be that as it may, in view of decision in **M/s Kirloskar Electric Co. Ltd. V/s. Commissioner of Sales Tax**, 1991 Vol. 83 of Sales Tax Cases, 485, decided by our own Hon'ble High Court, said two forms are to be taken into consideration while disposing of this application.

16. Counsel for the respondent has submitted that while disposing of this application this Appellate Tribunal may consider copies of the two 'C' forms produced on behalf of the applicant during pendency of this appeal, but, appropriate order may be passed calling upon the applicant to deposit by way of pre-deposit for the purpose of entertaining this appeal, having regard to the fact that no other statutory form has been filed or was filed before the authorities below ever since the concerned tax period and no step was taken by the applicant to secure the remaining statutory forms.



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17. Counsel for respondent has rightly contended that the matter pertains to tax period - Annual 2016 and on behalf of the applicant two E-mails, dated 18/09/2023, stated to be from the two branches of the applicant, submitted to show that steps have been taken by the applicant regarding collection of remaining statutory forms. These two E-mails do not reflect any steps earlier taken by the applicant or any of its branches to collect remaining statutory forms. One E-mail depicts reply from Advocate of the branch of the applicant in Himachal Pradesh. As per this E-mail, common portal of H.P. Taxation Department is under a process of migration to new system and such present system is not allowing generation of statutory forms. But, this E-mail does not reflect as to what were the steps, if any, earlier taken by the said branch to collect the statutory forms, and as to since when the process of migration to new system has begun.
18. The other E-mail depicts reply from Shillong Branch of the applicant. It is to the fact the CA of the said branch will provide 'F' form in the next month as the file is being processed by the department. But, this E-mail does not reflect as to what were the steps, if any, earlier taken by the said branch to collect the statutory forms, and as to since when the department is processing the matter.



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19. The third document submitted by the applicant about litigation going on between the applicant and one defendant is in the form of a commercial civil suit, which came to be instituted on 23/02/2022. No copy of the plaint of the said suit has been made available. In absence thereof, it cannot be said as to what are the pleadings and what is the prayer/ relief claimed in the said suit. It cannot be said that the said suit pertains to some issue regarding non-supply of some statutory forms by the said defendant to the applicant.
20. Counsel for the applicant has submitted that levy of interest should not be taken into consideration at the time of orders on such like application u/s 76(4) of DVAT Act.
21. In this regard, reference needs to be made to relevant provisions pertaining to levy of interest as available under CST Act, CST (Delhi) Rules, 2005, DVAT Act, DVAT Rules.

Rule 5 of CST (Delhi) Rules 2005 prescribes that the selling dealer is required to furnish to the Commissioner, the aforesaid declaration within a period of three months after the end of the quarter, to which the declaration relates. The selling dealer is required to furnish the said declaration alongwith reconciliation return prescribed in Rule 4 and



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original of the declaration form-C received by him from the purchasing dealer.

Proviso to sub-section (4) of section 8 of CST Act stipulates that the declaration is required to be furnished within the prescribed time or within such further time as permitted by the authority for sufficient cause, it appears that the concerned authority is competent to extend the period for furnishing of the declaration. In other words, the dealer has to apply for extension of time and the authority may extend the time when satisfied by the dealer about a sufficient cause for non submission of the declaration within the prescribed time.

22. Herein, no material has been placed on record by the applicant to show if any extension was sought by the dealer-appellant from the Commissioner for furnishing of statutory forms.

When law provides this facility, the dealer-appellant should have applied to the Commissioner specifying reasons as to why the statutory forms had not yet been received and as to why he required more time. But, the fact remains that there is nothing to suggest that the dealer ever applied to the Commissioner for extension of period.

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Section 9(2B) of CST Act, provides that if the tax payable by any dealer under this Act is not paid in time, the dealer shall be liable to pay interest for delayed payment of such tax and all the provisions for delayed payment of such tax and all the provisions relating to due date for payment of tax, rate of interest for delayed payment of tax and assessment and collection of interest for delayed payment of tax, of the general sales tax laws of each States, shall apply in relation to due date for payment of tax, rate of interest for delayed payment of tax, and assessment and collection of interest for delayed payment of tax under this Act in such States as if the tax and the interest payable under this Act were a tax and an interest under such sales tax law. This goes to show that dealers defaulting and failing to furnish central declaration form, as per the provisions of the Act, are liable to pay interest along with tax assessment made.

It is significant to note that as and when any statutory form is subsequently received by a dealer and then produced before the department or the OHA or before the Appellate Tribunal or before Hon'ble High Court or Hon'ble Supreme Court, same are considered by the concerned Assessing Authority and as submitted by counsel for the Revenue, generally no interest is levied on such forms. In such a situation, when



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dealer is not subjected to any liability of interest at all, considering as if the statutory forms were furnished from the very beginning, how can a dealer be said to be justified in putting forth the claim or filing objections or appeal on the ground that interest should not be levied from the date of filing of the return, in case he fails to produce the statutory forms at all and that too without any justification or bona fides.

23. Even though written arguments have been submitted on behalf of the applicant, except the contentions discussed above, counsel for the applicant has not advanced any other argument.
24. In view of the above discussion, the given facts and circumstances, the case law cited above, the issues involved, the factum of production of two 'C' Forms referred to above during pendency of this matter, and non-production of the rest of the statutory forms, and non-furnishing of satisfactory explanation as to the steps, if any, for collection of the remaining statutory forms, this is a case where applicant should be called upon to deposit 15% of the impugned tax and interest, under section 76(4) of DVAT Act, by way of pre-deposit, for the purposes of admission of this appeal. I

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order accordingly. Applicant firm to deposit the amount by way of pre-deposit within 25 days. ~~from today.~~

25. However, it is made clear that the observations made above are merely for the purposes of disposal of this application on the point of pre-deposit for the purposes of admission of appeal, and shall have no effect on the decision of the appeal on merits. Application is disposed of accordingly.
26. Counsel for the applicant to apprise the Registry and counsel for the respondent about compliance.
27. Appeal shall be taken up on 01/11/2023 for hearing of arguments, subject to compliance with the said order by the applicant. In case of non-compliance, matter shall be taken up for further orders having regard to the non-compliance.
28. Copy of the order be supplied to both the parties as per rules. One copy be sent to the concerned authority. Another copy be displayed on the concerned website.

Announced in open Court.
Date : 04/10/2023.

Narinder Kumar
4/10/2023
(Narinder Kumar)
Member (Judicial)



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In Appeal No. 118/ATVAT/23